Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-1802–08 OF 2013
AZAHAR MOHAMED, TENGKU MAIMUN AND HAMID SULTAN JJCA
9 SEPTEMBER 2014

Evidence — Witness — Compellability — Allegation of defamatory words in article — Whether article derived from various sources — Whether author of article chose to not disclose sources — Whether application compel author of article to disclose sources — Application dismissed by the High Court — Appeal against High Court's decision

In the High Court, the appellant ('the plaintiff') claimed against four defendants for defamatory statements which were published in an article entitled 'Chua and Tiong in Cahoots' in the *Sunday Times* on 6 September 2009 authored by one Joseph Sipalan. However, the proceedings against the defendants were discontinued and withdrawn. This action only subsisted against the respondent ('the fourth defendant'). It was the plaintiff's case that the alleged defamatory words in the article in question have been attributed to the fourth defendant by Joseph Sipalan and the 'sources'. The plaintiff subpoenaed Joseph Sipalan to testify before the High Court but Joseph Sipalan submitted that the article was reported as a result of telephone conversations that he had with the various sources described, but not identified, in the article. When asked to disclose the identities of the 'sources' referred to in the article, Joseph Sipalan declined to do so on the ground that he had promised 'the sources' that he would keep their identities confidence. As a result, the plaintiff made an application vide encl 35 for an order to, inter alia, compel Joseph Sipalan to disclose the names and particulars of the 'sources'. The High Court judge dismissed the plaintiff's application. Dissatisfied, the plaintiff appealed against the High Court's decision. However, the plaintiff had not closed his case and the trial before the High Court had been stayed pending the outcome of this appeal.

Held, dismissing the appeal with costs:

(1) The decision of the High Court judge handed down now forming the subject matter of the present appeal, was in effect and in substance a ruling made in the course of the trial, and not an order or a judgment as stated in s 67(1) of the Courts of Judicature Act 1964 (see para 9).

(2) Joseph Sipalan was no longer a party to the plaintiff's defamatory action. He was merely a witness. Enclosure 35 was filed and then determined by

the High Court judge during the course of the trial, even as Joseph Sipalan was in the midst of giving his testimony. Viewed in this way, the fact that a formal application was filed should not make any difference to the matter at hand. In substance, what was sought was a ruling by the High Court judge in the course of the trial as to whether Joseph Sipalan should be compelled to disclose the identity of the 'sources' (see para 10).

(3) If appeals are permitted against rulings made in the midst of a trial, this will affect a fair and expeditious disposal of court proceedings due to the likelihood for untimely and academic appeals as well as possible stays of proceedings pending such appeals. By staying the proceedings pending the disposal of the appeal, the final decision of the court on the action will also be held up. In any event, in the context of the present case, if the plaintiff was dissatisfied with the final outcome of his action against the fourth defendant, he may still raise the ruling of the learned High Court judge as part of his grounds of appeal (see para 14).

(4) Notwithstanding the High Court judge had directed the plaintiff to file encl 35 relating to relevancy and admissibility, the ultimate jurisdiction and power to decide on that issue will fall under s 136 of the Evidence Act 1950 and would not be covered by any of the provisions of the Rules of Court 2012 to say that the instant appeal arising from the interlocutory application is an interlocutory appeal under O 32 of the said Rules. If trial had not commenced, s 136 would have no application and the Rules of Court 2012 will be the overriding factor to be taken into consideration. That had been the practice and procedure in the administration of our civil justice (see para 16).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu ('plaintif') mendakwa terhadap keempat-empat defendan untuk pernyataan fitnah yang diterbitkan dalam artikel bertajuk 'Chua and Tiong in Cahoots' dalam surat khabar *Sunday Times* pada 6 September 2009 yang ditulis oleh seorang yang bernama Joseph Sipalan. Walau bagaimanapun, prosiding terhadap defendan tidak diteruskan dan ditarik balik. Tindakan ini hanya wujud terhadap responden ('defendan keempat'). Ia adalah kes plaintif bahawa perkataan-perkataan fitnah yang didakwa di dalam artikel yang dipersoalkan telah diarahkan kepada defendan keempat oleh Joseph Sipalan dan 'sources'. Plaintif menyampaikan sepina kepada Joseph Sipalan untuk memberi keterangan di hadapan Mahkamah Tinggi tetapi Joseph Sipalan berhujah bahawa artikel dilaporkan berdasarkan perbualan telefon yang dibuatnya dengan pelbagai sumber yang diterangkan, tetapi tidak dikenal pasti, di dalam artikel. Apabila diminta untuk mendedahkan identiti-identiti 'sources' yang dirujuk di dalam artikel, Joseph Sipalan enggan berbuat sedemikian atas alasan bahawa dia telah berjanji kepada 'the sources' yang dia akan menyimpan rahsia identiti-identiti mereka. Akibatnya, plaintif membuat permohonan melalui lampiran 35 untuk

perintah, antara lain, memaksa Joseph Sipalan untuk mendedahkan nama-nama dan butir-butir 'sources'. Hakim Mahkamah Tinggi menolak permohonan plaintif. Tidak berpuas hati, plaintif merayu terhadap keputusan Mahkamah Tinggi. Walau bagaimanapun, plaintif tidak menutup kesnya dan perbicaraan di hadapan Mahkamah Tinggi ditangguh sementara menunggu keputusan rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Keputusan hakim Mahkamah Tinggi yang diputuskan sekarang membentuk perkara rayuan ini, sebenarnya dan dalam kebenaran peraturan yang dibuat dalam perjalanan perbicaraan, dan bukan perintah atau penghakiman seperti yang dinyatakan dalam s 67(1) Akta Mahkamah Kehakiman 1964 (lihat perenggan 9).

(2) Joseph Sipalan bukan lagi pihak kepada tindakan fitnah plaintif. Dia semata-mata adalah saksi. Lampiran 35 difailkan dan kemudiannya ditentukan oleh hakim Mahkamah Tinggi semasa perjalanan perbicaraan, walaupun Joseph Sipalan sedang memberi keterangannya. Dilihat dari segi ini, fakta bahawa permohonan formal difailkan tidak patut menjadi apa-apa perbandingan kepada perkara tersebut. Sebenarnya, apa yang dipohon adalah peraturan oleh hakim Mahkamah Tinggi dalam perjalanan perbicaraan terhadap sama ada Joseph Sipalan patut dipaksa untuk mendedahkan indentiti 'sources' tersebut (lihat perenggan 10).

(3) Jika rayuan dibenarkan terhadap peraturan yang dibuat semasa perbicaraan, ini akan menjejaskan pendengaran cepat, cekap dan adil prosiding mahkamah akibat kepada kemungkinan rayuan-rayuan yang tidak kena pada masanya dan rayuan akademik dan juga kemungkinan penangguhan prosiding sementara menunggu rayuan-rayuan sedemikian. Dengan menangguh prosiding sementara menunggu pendengaran rayuan, keputusan muktamad mahkamah atas tindakan juga akan ditangguh. Walau bagaimanapun, dalam konteks kes ini, jika plaintif tidak berpuas hati dengan keputusan akhir tindakannya terhadap defendan keempat, dia boleh membangkitkan peraturan hakim Mahkamah Tinggi yang bijaksana sebagai sebahagian alasan rayuan (lihat perenggan 14).

(4) Walaupun hakim Mahkamah Tinggi telah mengarahkan plaintif untuk memfailkan lampiran 35 berkaitan kepada kerelevanan dan kebolehterimaan, bidang kuasa utama dan kuasa untuk memutuskan atas isu tersebut akan terangkum di bawah s 136 Akta Keterangan 1950 dan tidak akan dilindungi oleh mana-mana peruntukan Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk menyatakan bahawa rayuan ini berbangkit daripada permohonan interlokutori adalah rayuan interlokutori di bawah A 32 KKM. Jika perbicaraan tidak bermula, s 136

tidak boleh diguna pakai dan KKM akan menjadi faktor utama diambil kira untuk pertimbangan. Ini adalah amalan dan prosedur dalam pentadbiran keadilan sivil kita (lihat perenggan 16).]

Notes

For cases on compellability, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3124–3126.

Cases referred to

Mohd Khairy bin Ismail v PP [2014] AMEJ 594 (refd)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495, CA (refd)
Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 67, 67(1)
Evidence Act 1950 ss 136, 136(1), 167
Rules of Court 2012 O 32

Appeal from: Suit No S-23–99 of 2009 (High Court, Kuala Lumpur)

Prem Ramachandran (Kumar Partnership) for the appellant.
Chan Tse Yuen (Chan Tse Yuen & Co) for the first respondent.
Bhag Singh (Bhag Sulaiman & Co) for the second respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] This is an appeal by Datuk Seri Tiong King Sing, the appellant (the plaintiff in the High Court) against the decision of the learned High Court judge given on 31 July 2013 dismissing the appellant's application ('encl 35') dated 15 February 2013 to compel one Joseph Sipalan to disclose the 'sources' mentioned in the article entitled 'Chua and Tiong in Cahoots' which was published on 6 September 2009 in the *Sunday Times* of which Joseph Sipalan was the author.

[2] For convenience, we will refer to the parties in this judgment to the title assigned to them in the court below.

[3] The background facts and the sequence of events leading up to the present appeal are as follows. The plaintiff sued The New Strait Times Press (M) Bhd, Dato' Syed Nadzri bin Syed Harun, Joseph Sipalan and Datuk Seri Ong Tee Keat as the first, second , third and fourth defendants respectively. The plaintiff's claim against all the defendants is for defamatory statements which

were published in an article entitled 'Chua and Tiong in Cahoots' in the *Sunday Times* on 6 September 2009. However, the proceedings against The New Straits Times Press (M) Bhd, Dato' Syed Nadzri bin Syed Harun and Joseph Sipalan were subsequently discontinued and withdrawn. This action only subsists against Datuk Seri Ong Tee Keat (the fourth defendant) who is the only remaining defendant in this action. It is the plaintiff's case that the alleged defamatory words in the article in question have been attributed to the fourth defendant by Joseph Sipalan and the 'sources'.

[4] The plaintiff's action was fixed for trial on 30 January 2013. As events unfolded, the plaintiff subpoenaed Joseph Sipalan, the author of the article to testify before the learned High Court judge on 30 January 2013 concerning the publication of the article. Joseph Sipalan gave evidence as 'PW3'. During examination-in-chief at the trial of the action, Joseph Sipalan, inter alia, testified that:

(a) he was the author of the article that came to be published in the *Sunday Times* on 6 September 2009 entitled 'Chua and Tiong in Cahoots?';

(b) the article was reported as a result of telephone conversations that he had with the various sources described, but not identified, in the article;

(c) the fourth defendant had made a claim that there was a conspiracy between Datuk Seri Chua Soi Lek and the plaintiff and that they were building a war chest to topple the fourth defendant; and

(d) he knew the identities of the 'sources' referred to in paras 2–3, 5, 14 and 16 of the article and that they were all members of the Malaysian Chinese Association.

[5] When asked to disclose the identities of the 'sources' referred to in the article, Joseph Sipalan declined to do so on the ground that he had promised 'the sources' that he would keep their identities confidence. As a result, the plaintiff made an application vide encl 35 for an order to:

(a) compel Joseph Sipalan to disclose the names and particulars of the 'sources' referred to in paras 2–3, 5, 14 and 16 of the article; and

(b) that the disclosure be made in writing and served on the plaintiff's solicitors.

[6] As we have indicated earlier, the learned High Court judge had dismissed the plaintiff's application. Dissatisfied with the decision, the plaintiff filed an appeal to this court. It has to be noted that the plaintiff has not closed his case. In the meantime, the trial before the learned High Court judge has been stayed pending the outcome of this appeal.

[7] In the course of the submissions before us, an important question was raised: whether the decision of the learned High Court judge in dismissing encl 35, which was made in the course of the trial, is appealable to this court. A

[8] Learned counsel for the plaintiff argued that the present appeal concerned an order dated 31 July 2013 made on a substantive application brought by way of encl 35 filed by the plaintiff against Joseph Sipalan to compel disclosure. Learned counsel submitted that the appeal was not against a ruling made in the course of the trial considering that when the learned High Court judge decided that Joseph Sipalan need not disclose 'his sources', Her Ladyship made an order on a substantive application for which the plaintiff, a dissatisfied party, could appeal to the Court of Appeal within the meaning of s 67(1) of the Courts of Judicature Act 1964 ('the CJA'). B C

[9] With respect, we do not agree with this submission. In our judgment, the decision of the learned High Court judge handed down on 31 July 2013 now forming the subject matter of the present appeal, was in effect and in substance a ruling made in the course of the trial, and not an order or a judgment as stated in s 67(1) of the CJA which reads: D

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. E

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[10] It is true that in the present case, the plaintiff caused to be filed a formal application (encl 35) to require Joseph Sipalan to disclose the identity of the 'sources' and that this application was supported by an affidavit and replied through affidavit as well. Joseph Sipalan is no longer a party to the plaintiff's defamatory action. He was merely a witness. An important point which must not be overlooked is that encl 35 was filed and then determined by the learned High Court judge during the course of the trial, even as Joseph Sipalan was in the midst of giving his testimony. Viewed in this way, the fact that a formal application was filed should not make any difference to the matter at hand. What is of greater significance is at what juncture the said ruling was made? We agree with the submissions of learned counsel for Joseph Sipalan and the fourth defendant that in substance what was sought was a ruling by the learned High Court judge in the course of the trial as to whether Joseph Sipalan should be compelled to disclose the identity of the 'sources'. G H

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[11] Now, s 67 of the CJA provides that civil appeals may be lodged against a 'judgment' or 'order' of the High Court. The terms 'judgment' or 'order' are not defined in the CJA but they are collectively referred to as 'decision' as can be seen in s 3 of the CJA which states:.

> 'Decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[12] More significant still is that s 3 of the CJA qualifies a 'decision' so that it 'does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of parties'. That is why, in our judgment the decision of the learned High Court judge that Joseph Sipalan need not disclose 'his sources' was in fact a ruling made in the course of a trial, which did not finally dispose of the rights of the plaintiff. By reason thereof, it is not an order or a judgment as stated in s 67(1) of the CJA.

[13] The question of a right to appeal against a ruling made in the course of a trial was considered by the Court of Appeal in the case of *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495. In that case, the appellant appealed against the decision of the High Court, who had dismissed the appellant's appeal against the ruling of the registrar on an issue in regard to the admissibility of certain documents in the course of a hearings for assessment of damages. On appeal before the High Court and the Court of Appeal, both the parties argued on a preliminary issue namely, whether the appeal from the ruling by the registrar in regard to the admissibility of the documents was competent, and properly brought before the High Court in view of the definition of the word 'decision' in s 3 of the CJA. The Court of Appeal in the said case held that such a ruling was incapable of appeal. PS Gill JCA in delivering the judgment of the court said:

> Counsel for the respondent and appellant took us on a lengthy discourse of the nuances between a 'decision' which is a final order and a 'decision' as an interlocutory order, each holding their respective differing views, on whether the admissibility of the said documents was a final, and interlocutory order.
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> On hindsight, we feel that this entire exercise on the interpretation of the meaning of a final order, and an interlocutory order was needless, and the case law that was tendered irrelevant. This is simply because one needs to merely look at the cold print of s 3 of the CJA as amended, to see that any ruling made in the course of a trial or hearing of any cause and matter, which does not finally dispose the rights of the parties, does not constitute a decision for the purpose of s 3 of the CJA, as amended. This is the stark reality of s 3 of the CJA, as amended. It is simply, and lucidly stated leaving no room for doubt in its application. The intention of the legislature when drafting the amendment was that the amendment should serve as a filter process for appeals.
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> What we feel, however, must be emphasised with equal force when scrutinising s 3 of the CJA, as amended, is that, the said ruling must be made in the course of a trial or hearing. Much emphasis, we feel, is placed on the latter part of the sentence viz a viz '... does not finally dispose of the rights of the parties', thus overlooking the fact that the ruling must be made in the course of a trial or hearing of any cause or matter. Counsel, we found, appeared to be preoccupied with the determination of

whether the ruling disposes the rights of the parties, but paid scant regard to the fact as to at what juncture the said ruling was made.

Equal weight should be attached to the entire sentence of s 3 of the CJA, as amended, for what must be asked is not only whether a ruling does not dispose the final rights of the parties but also the question whether it was a ruling made in the course of a trial or hearing of any cause or matter. If it was not a ruling made in the course of a trial or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition 'decision' as provided in s 3 of the CJA, as amended, and is therefore appealable.

To answer to the question posed earlier on, the ruling by the learned deputy registrar on the admissibility of the documents, made in the course of a hearing, was with equanimity, we say, a ruling on an issue other than the ultimate question, and is thus excluded by the exclusion clause in the definition of 'decision' in s 3 of the CJA, as amended.

[14] We would only add the following in respect of the above passage: if appeals are permitted against rulings made in the midst of a trial, this will affect a fair and expeditious disposal of court proceedings due to the likelihood for untimely and academic appeals as well as possible stays of proceedings pending such appeals (see *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217). By staying the proceedings pending the disposal of the appeal, the final decision of the court on the action will also be held up. The application within which such a ruling is made would continue to remain alive despite the ruling, and the outcome of the final decision on the action would not depend on merely such a ruling. Indeed, an incorrect ruling may not even have a material effect upon the outcome of the action in question. In this regard, it is important to note that a litigant aggrieved with such a ruling may even end up succeeding in the action. In any event, in the context of the present case, if the plaintiff is dissatisfied with the final outcome of his action against the fourth defendant, he may still raise the ruling of the learned High Court judge as part of his grounds of appeal.

[15] Once trial starts, the Evidence Act 1950 ('the EA 1950') is triggered in respect of relevancy as well as admissibility of evidence. Section 136 of the EA 1950 contains elaborate rules as to admissibility of evidence. Relevancy is a question of law and admissibility is one of discretion taking into consideration the probative value of the evidence and its prejudicial effect (see *Mohd Khairy bin Ismail v Public Prosecutor* [2014] AMEJ 594). It is significant to note that s 167 of the EA 1950 provides that the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. In this way, the provisions of

ss 136 and 167 of the EA 1950 when read together envisage that the trial court must deal with relevancy and admissibility of the evidence in question, and only upon the end of the entire trial the appellate court can deal with the issues.

[16] In the present case, notwithstanding the learned High Court judge had directed the plaintiff to file encl 35 (purportedly under s 136(1) of the EA 1950 as it cannot be otherwise) relating to relevancy and admissibility, the ultimate jurisdiction and power to decide on that issue will fall under s 136 of EA 1950 and will not be covered by any of the provisions of the Rules of Court 2012 to say that the instant appeal arising from the interlocutory application is an interlocutory appeal under O 32 of the said Rules. If trial has not commenced, s 136 of the EA 1950 will have no application and the Rules of Court 2012 will be the overriding factor to be taken into consideration. That has been the practice and procedure in the administration of our civil justice.

[17] It is for all these reasons we hold that the present appeal is incompetent and thus non-appealable. This appeal is therefore dismissed with costs in the sum of RM5,000 to the fourth defendant and RM10,000 to Joseph Sipalan. We ordered that the deposit to be refunded. Parties to appear before the same the learned High Court judge on 5 September 2014 for case management to set a date to resume the hearing of the trial.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor